

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

UNITED STATES OF AMERICA,	§	
	§	
v.	§	CR. No. C-08-291 (1)
	§	
ALBERTO ALVARADO.	§	

**ORDER GRANTING MOTION FOR EXTENSION
OF TIME TO APPEAL AND APPOINTING NEW COUNSEL**

On October 24, 2008, the Clerk of this Court received from court-appointed counsel for Albert Alvarado (“Alvarado”) an opposed motion for extension of time to appeal, as well as a Notice of Appeal. (D.E. 60, 61.) In it, counsel Stephen McMains states that he incorrectly advised Alvarado that he had 30 days to file a notice of appeal, and that Alvarado relied on this advice to wait to file the notice of appeal. (D.E. 60 at 1.) He requests an extension of time to file the appeal pursuant to Fed. R. App. P. 4(b)(4). Rule 4(b)(4) allows a district court to grant an additional thirty days beyond the ten-day period for appealing, with or without motion and notice, upon a finding of “excusable neglect or good cause.” In order to be timely, Alvarado’s notice of appeal had to be filed on or before October 15, 2008.¹ He did not file a timely Notice of Appeal, but his motion seeking an extension and Notice of Appeal were both filed on October 24, 2008. (D.E. 60, 61.) Thus, he has sought an extension within the 30-day window set forth in Fed. R. App. P. 4(b).

Because Alvarado’s notice of appeal was filed within that 30-day window, this Court can grant his motion for extension of time upon finding excusable neglect or good cause. Court-appointed counsel admits that he gave erroneous information to Alvarado concerning the deadline for appealing. In similar circumstances, the Fifth Circuit has recognized that an attorney’s failure

¹ Judgment was entered against Alvarado on September 30, 2008. Ten days after that date, excluding intermediate weekends and the Columbus Day holiday pursuant to Fed. R. App. P. 26(a), was October 15, 2008.

to file an appeal pursuant to a defendant's request would be ineffective assistance of counsel and would thus constitute excusable neglect for filing an untimely appeal. United States v. Clark, 193 F.3d 845 (5th Cir. 1999). As in another Fifth Circuit case relied upon and discussed in Clark, if the facts as alleged by Alvarado are true, his attorney here did not timely file a notice of appeal, nor did he seek to withdraw. See Clark, 193 F.3d at 847 (discussing United States v. Bergeron, 74 F.3d 1238 (5th Cir. 1995)). Thus, Alvarado has shown excusable neglect.

For the foregoing reasons, the Court finds that good cause or excusable neglect exists for Alvarado's late notice of appeal. Accordingly, his notice of appeal should be deemed timely.

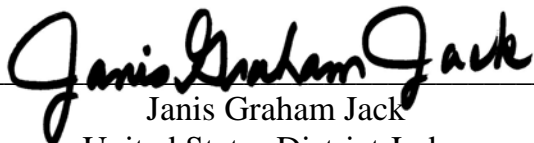
Finally, the Court notes that Alvarado was determined to be financially unable to obtain an adequate defense in his underlying case and was represented throughout the proceedings by appointed counsel. Thus, he has shown his financial eligibility for counsel. Cf. Fed. R. App. P. 24(a)(3) (criminal defendant is entitled to proceed on appeal *in forma pauperis* without further authorization, absent a contrary statute or a certification by the district court that the appeal is not taken in good faith or he is otherwise not entitled to *ifp* status); see also Fed. R. Crim. P. 44 (a financially qualified defendant is "entitled to have counsel appointed to represent [him] at every stage of the proceeding from initial appearance ***through appeal***, unless the defendant waives this right.")

Because of the admitted mistakes of his appointed counsel and the Court's finding that he was constitutionally ineffective, how the Court will appoint new counsel to represent Alvarado on appeal. Accordingly, attorney Chris Iles, 1919 Highway 35 North, Rockport, Texas 78382, (361) 883-2020 is hereby appointed to represent Alvarado on appeal. Stephen McMains is terminated as counsel of record.

CONCLUSION

For the foregoing reasons, Alvarado's motion for extension of time to appeal (D.E. 60) is GRANTED and his appeal is deemed timely filed. Chris Iles is hereby appointed to represent Alvarado on appeal. Stephen McMains' appointment is hereby terminated.

ORDERED this 6th day of November, 2008.



Janis Graham Jack
United States District Judge